

**STATE OF WISCONSIN
Department of Commerce**

In the Matter of the PECFA Appeal of

Lyle Hansen
The Corner Store
309 E Lincoln Ave
Fall Creek WI 54742-9452

PECFA Claim #54742-9452-09
Hearing #01-23

Final Decision

P R E L I M I N A R Y R E C I T A L S

Pursuant to a petition for hearing filed January 18, 2001, under §101.02(6)(e), Wis. Stats., and §ILHR 47.53, Wis. Adm. Code, to review a decision by the Department of Commerce, a hearing was commenced on November 6, 2001, at Madison, Wisconsin. A proposed decision was issued on, and the parties were provided a period of twenty (20) days to file objections.

The issue for determination is: **Whether the department's decision dated December 22, 2000 was incorrect with regard to the disputed costs identified in petitioner's appeal dated January 3, 2001 and received by the department January 18, 2001.**

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Via telephone

Lyle Hansen
The Corner Store
309 E Lincoln Ave
Fall Creek WI 54742

Michael K. Neal
Advent Environmental
5110 Fairview Drive, Suite A
Eau Claire, WI 54701

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Department of Commerce
PECFA Bureau
201 West Washington Avenue
PO Box 7838
Madison WI 53707-7838

By: Jean Beckwith

Department of Commerce
201 W. Washington Ave.
PO Box 7838
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In Person

Douglas Joseph
Hydrogeologist
Department of Natural Resources
1300 W. Clairemont Avenue
P.O. Box 4001
Eau Claire, WI 57702-4001

Via Telephone

The authority to issue a final decision in this matter has been delegated to the undersigned by order of the Acting Secretary dated September 26, 2001.

The parties have stipulated, on the record, to settlement of the issue of alleged financial services on Advent invoice #s 11310, 11783, 12551 and 13119 with the department agreeing to pay \$29.90. The remaining issue remains in dispute. The matter now being ready for decision, I hereby issue the following

FINDINGS OF FACT

The appellant, The Corner Store, by Lyle Hansen, operates a year round convenience store on the property. The appellant submitted its claim for reimbursement of the costs it incurred in the remediation of the petroleum-contaminated site in question in the amount of \$76,751.68. Of that amount, \$886.90 was denied by the PEFCA program, in a letter entitled Breakdown of PEFCA Costs dated December 22, 2000. The appellant submitted an appeal that was received by the department on January 18, 2001 for the following items. Advent Environmental invoice #s 11310, 11783, 12551 & 13119 in financial charges (\$29.90) and Environmental invoice #s 12064, 12551, 13119 & 412456 for full VOCs following site investigation (\$857.00).

The appellant, as part of its claim for PECFA reimbursement, submitted a report from its consultant dated April 8, 1998, which indicated that tetrachlorethene, which is a common solvent, was detected in all of the site monitoring wells including the upgradient well. Further, that they were

unable to identify an on-site source for the tetrachloroethene and that it may be migrating from an upgradient off-site source. The DNR sent a letter to appellant dated January 27, 1999, recommending continued quarterly ground water and natural attenuation monitoring at the site, as well approving VOC testing after site investigation. The letter did not require the monitoring of PEFCA eligible products.

APPLICABLE STATUTES AND CODE PROVISIONS

Wisconsin Stats. § 101.143(3)(f) provides, in part, as follows:

Application. A claimant shall submit a claim on a form provided by the department. The claim shall contain all of the following documentation of activities, plans and expenditures associated with the eligible costs incurred because of a petroleum product discharge from a petroleum product storage system.

...

4. Accounts, invoices, sales receipts or other records documenting actual eligible costs incurred because of the discharge.

Wisconsin Stats. § 101.143(4)(c) provides, in part, as follows:

Exclusions from eligible costs. Eligible costs for an award under par. (a) does not include the following:

...

3. Other costs that the department determines to be associated with, but not integral to, the eligible costs incurred because of a petroleum product discharge from petroleum storage system or from a home oil tank system

Wisconsin Admin. Code COMM 47.30(1), provides, in part, as follows:

(1) ELIGIBLE COSTS. Eligible costs for an award issued under this chapter may be determined by the department based upon cost guidelines published by the department. Costs related to the following categories may be reimbursed under the scope of this chapter:

...

- (e) Costs associated with personnel, travel and related expenses:

- (3) Actual costs incurred for travel and lodging which are not in excess of state travel;

Wisconsin Admin. Code COMM 47.30(2), provides, in part, as follows:

(2) EXCLUSION FROM ELIGIBLE COSTS. The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats. lists specific cost items which may not be reimbursed under the PEFCA program. In order to control costs and provide awards for the most cost-effective remediation of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial activities under the scope of this chapter:

...

4. Any costs associated with the actions that exceed the necessary activities to bring a site to the required level of remediation.

...

(c) Costs for testing or sampling unrelated to the investigation for the extent of contamination under the scope of this chapter:

...

2. Costs associated with the analysis for inappropriate constituents not normally part of or associated with an eligible petroleum product even if required by the DNR; and

3. Costs associated with full VOC testing after site the investigation phase, unless required by the DNR for monitoring PEFCA eligible products and the DNR letter documenting the requirement submitted with the claim.

(Emphasis added).

DISCUSSION

VOC Test After Site Investigation

The department denied reimbursement of the cost of the lab services provided by Advent Environmental Services, Inc. on invoice #s 12064, 12551, 13119 and 412456 based on the assertion that the costs were after the site investigation phase and were associated with the analysis for inappropriate constituents (for example Tetrachloroethene which is not present in petroleum products but is a common solvent) under Wisconsin Admin. Code COMM 47.30(2)(c) 2 & 3. The department pointed to the relevant sections of the administrative code as instructive on the issue of the ineligibility of costs under the PEFCA program. The department also established that the purpose for the DNR letter to appellant, as it related to VOC testing, was to monitor for the ineligible compound, tetrachloroethene, which may have been migrating from an outside source. The department also established that tetrachloroethene was not a constituent associated with an

eligible petroleum product. The department argued that the letter from DNR did not require monitoring for a PEFCA eligible product as required under COMM 47.30(2)(c) 3.

The appellant argues that the department should provide reimbursement for the additional rounds of VOC testing following the site investigation because of the letter from DNR and several telephone calls between the appellant and unknown representatives from the DNR. The appellant failed to provide a letter from the DNR approving additional VOC testing after site investigation not specifically required the monitoring of PEFCA eligible products as required under COMM 47.30(2)(c) 3 or any persuasive argument of why the PEFCA program should reimburse the costs.

CONCLUSIONS OF LAW

The appellant was an owner or agent of a covered property by the remedial provisions of Wis. Stats. 101.143.

The department was incorrect in denying reimbursement of costs totaling \$29.90 as financial services as not being covered under Comm 47.30(2)(d) 7, when in fact the costs were covered under Comm 47.30 (1)(e) 3.

The department was correct in denying reimbursement of costs totaling \$857.00 associated with four rounds of full VOC testing completed after the site investigation within the meaning of Comm 47.30(2)(c) 3.

DECISION

The department is instructed to pay the amount of \$29.90, which the parties stipulated to on the record. The department's decision to deny reimbursement for the cost in the amount of \$857.00, for four rounds of VOC testing following site investigation is affirmed.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under §227.48, Stats. If you believe this decision is based on a mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send or deliver a written request to Rehearing Request, Department of Commerce, Office of Legal Counsel, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970. Rehearing requests may also be filed by fax at the following number: (608) 266-3447. Faxed rehearing requests received after 4:30 p.m. on a business day will be filed effective the next business day.

Send or fax a copy of your request for a new hearing to all the other parties named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the hearing examiner made and why it is important. Or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request will have to be denied.

Your request for a new hearing must be received no later than 20 days after the mailing date of this decision as indicated below. Late requests cannot be granted. The process for asking for a new hearing is in Sec. 227.49 of the state statutes

Petition For Judicial Review

Petitions for judicial review must be filed no more than 30 days after the mailing date of this hearing decision as indicated below (or 30 days after a denial of rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Department of Commerce, Office of the Secretary, 201 W. Washington Avenue, 6th Floor, PO Box 7970, Madison, WI 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" and counsel named in this decision. The process for judicial review is described in Sec. 227.53 of the statutes.

Dated: _____

Joseph R. Thomas
Administrative Law Judge
Wisconsin Department of Commerce
PO Box 7838
Madison WI 53707-7838

copies to:

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309 E Lincoln Ave
Fall Creek WI 54742-9452

John A. Kisiel
Department of Commerce
201 W. Washington Ave., Rm 322A
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In Person

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Date Mailed: _____
Mailed By: _____